

EXHIBIT 1

MAGTEN ASSET VS. NORTHWESTERN CORP

CHRISTOPHER KEARNS - 1/10/08

CONCORDANCE AND CONDENSED TRANSCRIPT
PREPARED BY:

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- (1)
- (2) **A.** What I viewed as the purpose of my
- (3) report is embodied in the summary of opinions
- (4) that I assume we are about to discuss and the
- (5) discussion behind it that supports to these
- (6) opinions.
- (7) I was asked to, as I said, rebut the
- (8) conclusions of Mr. Marcus. He doesn't make any
- (9) different conclusion about timing or
- (10) acceleration of a bankruptcy or solvency. So
- (11) since he didn't do the analysis, I don't have
- (12) to rebut it.
- (13) **Q.** Have you made any conclusions about
- (14) whether or not in late 2002 NorthWestern was
- (15) able to meet its obligations as they became
- (16) due?
- (17) **A.** As you see in the report in
- (18) Exhibit A, there is a summary of liquidity
- (19) available at that time. There is a discussion
- (20) in my report as well of my opinion that
- (21) NorthWestern would have had the ability to
- (22) close the senior financing when it did or
- (23) earlier.
- (24) I'm sorry. The context of time you
- (25) **Q.** Right.

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- (1)
- (2) **A.** I talk about liquidity. I talk
- (3) about the company's ability to close the
- (4) financing.
- (5) However, let me go back and repeat
- (6) what I said in a prior answer. You're asking
- (7) me to render a solvency opinion. My role was
- (8) to rebut Mr. Marcus. He didn't render a
- (9) solvency opinion, so nor did I.
- (10) **Q.** No, I'm not asking you to render a
- (11) solvency opinion.
- (12) **A.** I'm sorry. I think that question
- (13) certainly deals with the ability to pay debts
- (14) as they come due as a cash flow solvency.
- (15) **Q.** Let me try again.
- (16) **A.** Thank you.
- (17) **Q.** In connection with the work that you
- (18) did, did you form any view about whether as a
- (19) factual matter by late 2002, whether
- (20) NorthWestern had income sufficient to support
- (21) its existing debt levels?
- (22) **A.** Pardon me. The best way I can
- (23) answer your question is to point you to it in
- (24) my report, the bottom of page 3, the top of
- (25) page 4, and that discussion on liquidity, the

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- (1)
- (2) senior financing, and point you to Exhibit 2 as
- (3) we have been talking about. So I focused on
- (4) liquidity.
- (5) **Q.** Did you look at documents that
- (6) informed you about the actual state of affairs
- (7) at NorthWestern in late 2002 in connection with
- (8) the preparation of your report?
- (9) **MS. DELANEY:** Objection to form.
- (10) **A.** I would be happy to go through
- (11) Appendix A piece by piece, if you like, in
- (12) terms of the context of the question you're
- (13) asking me. I looked at a lot of documents.
- (14) **Q.** Do you recall looking at documents
- (15) from which you formed a view? I'm not talking
- (16) an opinion — strike that.
- (17) Do you recall looking at documents
- (18) from which you formed an understanding about
- (19) NorthWestern's liquidity levels during late
- (20) 2002?
- (21) **A.** Same answer. We can go through
- (22) Appendix A. I looked at a lot of documents
- (23) which included internal data as well as huge
- (24) case projections included in the senior secured
- (25) financing offering memorandum. I don't know

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- (1)
- (2) how to better answer your question.
- (3) **Q.** As a result of looking at those
- (4) documents, what is your understanding of what
- (5) the NorthWestern's position was with respect to
- (6) liquidity in late 2002?
- (7) **MS. DELANEY:** Objection.
- (8) **Q.** If you have an understanding.
- (9) **A.** Again, best way I can posit this is,
- (10) I would be happy to discuss and spend all the
- (11) time you like on it. It's the bottom of
- (12) page 3, top of page 4 on my opinion with
- (13) respect to NorthWestern's liquidity and its
- (14) ability to have that liquidity through 2002 and
- (15) into 2003, and as I indicate on the top of
- (16) page 4, to me the clear demonstration of that
- (17) ability in addition to Appendix 2 is in my
- (18) opinion the company would still have had the
- (19) ability even in the scenario posited by
- (20) Mr. Marcus to close on the \$390 million senior
- (21) secured facility.
- (22) **Q.** Mr. Kearns, as we look at the bottom
- (23) of page 3, do you see the words, "Would have"?
- (24) **A.** Yes.
- (25) **Q.** I'm asking you a different question.

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(1)

(2) Q. Now, we've marked your report as

(3) Exhibit 1. Could you thumb through it and

(4) confirm that is your expert report?

(5) A. (Witness reviewing document.)

(6) Q. I don't mean to limit any

(7) examination that you would like to do. So if

(8) you want to more than thumb through it, please

(9) feel free.

(10) A. Yes.

(11) (Whereupon a report by Mr. Marcus

(12) was marked as Kearns Exhibit 2 for

(13) identification, as of this date.)

(14) Q. Sir, we've marked as Exhibit 2 the

(15) report prepared by Mr. Marcus. So to the

(16) extent you would like to refer to it, you have

(17) it there, and also, of course, I may be asking

(18) questions that refer to it.

(19) A. Okay.

(20) Q. I'm looking at page 3 of your

(21) report.

(22) A. Okay.

(23) Q. And at the section that you have

(24) labeled, "Summary of Conclusions," are you with

(25) me?

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(1)

(2) A. Yes.

(3) Q. Let's look at the first sentence

(4) together.

(5) "Marcus assumes that, had

(6) NorthWestern disclosed the negative financial

(7) information concerning its non-regulated

(8) businesses earlier in 2002, NorthWestern would

(9) not have acted any differently than it did

(10) act."

(11) Can you show me where in the report

(12) Mr. Marcus says that or where you derive that

(13) assumption?

(14) A. It's not an assumption. It is my

(15) conclusion, and I derive it from, frankly, the

(16) body of Mr. Marcus' report when he talks about

(17) the chain of events that would have happened

(18) and in the event that, as he posits it,

(19) different and more negative information was put

(20) out in the marketplace by the company earlier

(21) than what occurred, and the way I read his

(22) report, then, the assumption he makes is that

(23) the secured financing would have been

(24) considered at the time it was as well as the

(25) equity offering and the like.

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(1)

(2) I don't see where there is

(3) discussion about timing and preservation of

(4) liquidity in the event that the scenario he

(5) posits were to happen. For example, I didn't

(6) see anything in his report similar to what is

(7) in mine as Exhibit 2.

(8) Q. So if he had something that looked

(9) like Exhibit 2, you would not state that Marcus

(10) assumed that NorthWestern would not have acted

(11) differently?

(12) MS. DELANEY: Objection.

(13) A. Frankly, if he had something like I

(14) have in Exhibit 2, his conclusions would have

(15) been completely different.

(16) Q. Which conclusions would have been

(17) different?

(18) A. The company's -- well, I'll be happy

(19) to go through it, because a lot of it is

(20) embodied in my report, in particular, section

(21) Roman numeral V.

(22) Q. Now, is it your view that you

(23) establish in your report that if efforts had

(24) been accelerated to improve NorthWestern's

(25) financial condition, bankruptcy would not have

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(1)

(2) ensued?

(3) MS. DELANEY: Can I hear the

(4) question again, please?

(5) (Whereupon the record was read back

(6) by the reporter.)

(7) A. I don't have a view on whether

(8) bankruptcy ultimately would have been avoided.

(9) Q. So accelerating the acceleration

(10) efforts that you describe in your report may or

(11) may not have impacted what in reality became a

(12) September 2003 bankruptcy filing, correct?

(13) MS. DELANEY: Objection to form.

(14) A. Let me try it this way: I was asked

(15) by counsel to evaluate and, where appropriate,

(16) rebut the conclusions made by Mr. Marcus. I

(17) didn't see -- if you can point it out to me, I

(18) would be happy to discuss it with you -- where

(19) he has any conclusions that say anything

(20) different than September of '03. So I didn't

(21) comment on it. I don't have a view on it. The

(22) bankruptcy happened September of '03, as we all

(23) know.

(24) Q. So what did you view as the purpose

(25) of your report?

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(1)

(2) Let's try it again.

(3) As a result of the documents that

(4) you reviewed, did you develop an understanding

(5) of what NorthWestern's actual historical

(6) liquidity position was during late 2002?

(7) **A.** This goes back to the discussion you

(8) and I just had about my opinion 1, which is the

(9) premise, I believe, embodied in Mr. Marcus'

(10) report that NorthWestern would not have acted

(11) any differently than it did, meaning the

(12) liquidity that you allude to in late 2002 would

(13) have been as it was even if NorthWestern had

(14) made the disclosures earlier that Mr. Marcus

(15) posits, meaning you're asking me to assume bad

(16) news hits the marketplace and the company has

(17) done nothing to react, and in my opinions 1 and

(18) 2, that is not what I'm saying.

(19) **Q.** That wasn't my question. Let's try

(20) again.

(21) **A.** Ask it again.

(22) **Q.** I'm not asking you to assume

(23) anything. I'm asking you whether in reviewing

(24) documents and reviewing historic financial

(25) reports or 10-Q's, amended or original,

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(1)

(2) whatever it is you looked at, whether you

(3) developed an understanding of what

(4) NorthWestern's liquidity position was in late

(5) 2002.

(6) **A.** Sitting here today, the best way I

(7) can answer that is in late 2002, as discussed

(8) at the bottom of page 2, the top of page 3, in

(9) my opinion NorthWestern had the ability, and as

(10) we know, did close on the senior secured

(11) facility.

(12) That could have happened in February

(13) as it did after the bad news hit the

(14) marketplace or earlier, with bad news hitting

(15) the marketplace earlier as Mr. Marcus posits.

(16) I don't know how better to answer your

(17) question.

(18) **Q.** By late 2002, isn't it the fact that

(19) even with uncorrected SEC reports out there

(20) that NorthWestern was significantly

(21) overleveraged and with current projected income

(22) insufficient to support its existing debt

(23) levels?

(24) **MS. DELANEY:** Objection.

(25) **Q.** Is that something you looked at in

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(1)

(2) connection with the work you did to form the

(3) opinions that are contained on pages 3 and 4,

(4) et cetera?

(5) **A.** Well, that sounds to me again like a

(6) backhanded way of asking me to opine on cash

(7) flow solvency. Mr. Marcus didn't do it, and in

(8) rebutting Mr. Marcus, since he didn't render a

(9) cash flow solvency opinion, neither did I.

(10) However, as we discussed, in my

(11) view, as I have gone through now more than

(12) once, particularly as evidenced by the ability

(13) to close the senior secured facility and even

(14) after the bad news, substantially all the bad

(15) news would have been known by the prospective

(16) lenders. NorthWestern had liquidity to get

(17) through 2002 and into 2003, but I'm not going

(18) to answer questions that deal with looking for

(19) me to opine on cash flow or balance sheet

(20) solvency.

(21) You asked about leverage there.

(22) That was a loaded question in terms of leverage

(23) and cash flow, either of which could be

(24) construed as asking me for a solvency opinion.

(25) Your expert didn't render that opinion, nor did

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(1)

(2) **I.**

(3) **Q.** So is it your view that every time I

(4) ask you about whether you have an understanding

(5) of something, that I'm asking you for your

(6) opinion?

(7) **A.** You can read that last question

(8) back, if you like, but that was my view on that

(9) question, the way you asked the prior question.

(10) **Q.** We will try again.

(11) Did you read any documents provided

(12) to you by NorthWestern in which NorthWestern

(13) stated that at the end of 2002 or by late 2002

(14) NorthWestern was significantly overleveraged

(15) with current and projected income sufficient to

(16) support existing debt levels? Did you see any

(17) documents that describe NorthWestern in that

(18) way?

(19) **A.** If you want to show me a document,

(20) I'll be happy to comment on it. I don't know

(21) how to better answer your question than I have,

(22) which is I looked at a bunch of documents

(23) listed in Appendix A. I have come to a

(24) conclusion that NorthWestern would have had

(25) adequate liquidity through 2002 and into 2003,

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- (1)
- (2) particularly as evidenced by its ability to
- (3) close the senior credit facility. If you want
- (4) to show me a document, I'll be happy to comment
- (5) on it.
- (6) Q. In order to form your opinions that
- (7) you -- this opinion that you keep repeating
- (8) about liquidity, in order to form that
- (9) opinion --
- (10) MS. DELANEY: Objection.
- (11) Q. -- did you have to gain an
- (12) understanding of what as a factual matter
- (13) NorthWestern's liquidity position was during
- (14) late 2002?
- (15) MR. KALECZYC: Objection.
- (16) MS. DELANEY: Objection.
- (17) A. The best way I can answer your
- (18) question the way you asked that one is to point
- (19) you Appendix 2, where I looked at ending cash
- (20) position for NorthWestern as it reported it and
- (21) made adjustments to, on a pro forma basis, and
- (22) develop a view on available liquidity at
- (23) December 31, 2002, accepting Mr. Marcus'
- (24) premise that the equity offering would not have
- (25) closed, certainly disagreeing with Mr. Marcus'

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- (1)
- (2) premise that the senior facility could not have
- (3) closed and making other adjustments as you see
- (4) there. I don't know how to better answer your
- (5) question.
- (6) Again, to some extent this goes back
- (7) to the first question which the -- I'm sorry,
- (8) the first opinion of mine and how I view
- (9) Mr. Marcus' report and conclusions as against
- (10) what the company could have done to have
- (11) adequate liquidity through 2002 and into 2003.
- (12) If we are talking past each other, I apologize,
- (13) but I don't know how to better answer this.
- (14) Q. So as we look at the chart you enjoy
- (15) turning to, you have no view about whether
- (16) either the cash availability number at the top
- (17) of the chart, the \$46 million number or the
- (18) cash number at the bottom of the chart, the
- (19) \$135 million number, was sufficient in any way
- (20) to support existing debt levels at NorthWestern
- (21) as of the end of December 2002; is that
- (22) correct?
- (23) MS. DELANEY: Objection.
- (24) A. First of all, it's 136.5 at the
- (25) bottom of the chart. The 45 million at the

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- (1)
- (2) top, as you see, I have adjusted for various
- (3) factors, and I'm going to say this again. My
- (4) opinion at the bottom of page 3, top of page 4,
- (5) is adequate liquidity through 2002 and into
- (6) 2003.
- (7) To my view, the way you asked that
- (8) question again was asking for me to render an
- (9) opinion on cash flow solvency. Your guy didn't
- (10) do it. I didn't rebut in that context because
- (11) there wasn't a cash flow solvency opinion
- (12) embodied in Mr. Marcus' report. I don't know
- (13) how better to answer this.
- (14) Q. What was your understanding of the
- (15) amounts that were necessary for NorthWestern to
- (16) have available to support its existing debt
- (17) levels at the end of 2002?
- (18) MS. DELANEY: Objection.
- (19) A. Same answer as prior.
- (20) Q. So you determined that it had
- (21) sufficient liquidity without determining what
- (22) the amounts necessary to support the debt
- (23) levels would be?
- (24) A. Same answer, bottom of page 3, top
- (25) of page 4 on the issues that were evaluated by

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- (1)
- (2) the prospective lenders who decided to fund in
- (3) through a senior secured facility, the
- (4) information that they looked at and evaluated.
- (5) We can look at that offering memo if
- (6) you like but, again, my conclusion was
- (7) NorthWestern would have had access to adequate
- (8) liquidity through 2002 and into 2003 even as
- (9) Mr. Marcus posits without the proceeds of the
- (10) equity offering.
- (11) Q. And that's a determination you made
- (12) without determining amounts necessary for
- (13) NorthWestern to support its existing debt
- (14) levels; is that correct?
- (15) A. The single biggest debt payment
- (16) arising arguably at the end of 2002 would have
- (17) been the paydown or payoff of the revolver.
- (18) The outstanding revolver was accomplished with
- (19) the senior secured facility.
- (20) I don't know how to better answer
- (21) your question, because outside of the revolver,
- (22) to my understanding, there was not a maturity
- (23) of any additional significance during that time
- (24) frame. I believe there are some medium-term
- (25) notes that were paid off around that time or

EXHIBIT 2

SEALED DOCUMENT